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IN THE

Supreme Court of the United States

IN RE: ALCAN ALUMINUM CORPORATION,

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Third Circuit usurped its appellate authority by denying Alcan Aluminum Corporation's Petition for a Writ of Mandamus to vacate an Order denying a Motion for Recusal of the district court trial judge where the petitioner demonstrated facts sufficient to show a fundamental lack of impartiality and an apparent bias in violation of 28 U.S.C. §455(b).

RULE 29.6 STATEMENT

Petitioner, Alcan Aluminum Corporation, is a wholly owned subsidiary of Alcan, Inc., a Canadian company formerly known as Alcan Aluminium Limited.

RULE 14.1(b) STATEMENT

The parties to the proceedings before the United States District Court for the Middle District of Pennsylvania and the United States Court of Appeals for the Third Circuit include:

- The United States of America, Plaintiff
- Alcan Aluminum Corporation, Defendant
- Honorable Thomas I. Vanaskie, Chief Judge Middle District of Pennsylvania

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On Recusal

On February 7, 2001, Judge Vanaskie denied Alcan's Motion for Recusal in the above case. Reprinted at A-1. On April 3, 2001, the United States Court of Appeals for the Third Circuit denied Alcan's Petition for Writ of Mandamus seeking recusal of the Honorable Thomas I. Vanaskie in Civil Action No. 99-CV-1160, United States District Court, Middle District of Pennsylvania. Reprinted at A-26 On June 22, 2001, the United States Court of Appeals for the Third Circuit denied petitioner Alcan Aluminum Corporation's Petition for Panel Rehearing/Rehearing *En Banc*. Reprinted at A-27.

On Remand

On June 28, 1995, the United States District Court for the Middle District of Pennsylvania issued its Memorandum and Order holding Alcan jointly and severally liable for the costs incurred by the United States in cleaning-up the Susquehanna River. On October 4, 1995, the United States District Court for the Middle District of Pennsylvania issued its Memorandum and Order denying Alcan's motion for reconsideration. On August 22, 1996, the United States Court of Appeals for the Third Circuit affirmed the trial court's finding on remand. Subsequently, the United States Court of Appeals for the Third Circuit denied Alcan's request for rehearing *en banc*.

JURISDICTION

Subject matter jurisdiction in the United States District Court for the Middle District of Pennsylvania

was predicated on 28 U.S.C. §1345 and 42 U.S.C. §9607(a).

Petitioner Alcan Aluminum Corporation timely filed a Petition for Writ of Mandamus with the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1651(a) and Rule 21(a) of the Federal Rules of Appellate Procedure. The Court of Appeals denied the Petition by Order dated April 3, 2001. Petitioner's request for panel rehearing or rehearing *en banc* was subsequently denied June 22, 2001.

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1651(a) and in accordance with Rule 20 of the Rules of the Supreme Court of the United States.

THE STATUTE INVOLVED

Title 28, §1651(a) of the United States Code provides that:

> The Supreme Court and all other courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and applicable to the usages and principles of law.

STATEMENT OF THE FACTS

This case was filed by the United States against the petitioner, Alcan Aluminum Corporation ("Alcan") under §107 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9607 ("CERCLA", commonly known as "Superfund"). The government sought to have Alcan held jointly and severally liable for those costs of remediation not collected from other parties whose wastes were

disposed at the Butler Tunnel Superfund Site (the "Site").

The Site was a series of abandoned mine tunnels adjacent to the Susquehanna River. During the 1980s, a state licensed waste oil recycler operated by one Russell Mahler ("Mahler") under various corporate identities contracted with the owner of a gas station for the disposal of waste materials down a bore-hole to an abandoned coal mine located under his property. The bore-hole was a vertical shaft that provided air to the coal mine tunnels located below.

Alcan, along with a number of other companies and numerous Federal facilities, including, but not limited to, National Airport, Dulles International Airport, Andrews Air Force Base and Griffiss Air Force Base also had waste products handled by Mahler. Mahler disposed various wastes from these parties by dumping it down the bore-hole illegally.

As a result of two unusual hurricanes, the waste deposited in the mine tunnels was twice washed into the Susquehanna River. These releases prompted government response actions to contain the floating oil by means of booms and then its removal. After the second release, the EPA was able to identify "hazardous substances" in the oil floating on the river as that term was defined by the then recently enacted Superfund, 42 U.S.C §9601 *et seq.* The government was able to use Superfund in its response to the second release. The response action was essentially limited to installing floating oil booms and collecting the floating oil for disposal. Substances that were not contained in the floating materials went unremediated.

STATEMENT OF THE CASE

In 1989, the United States brought a CERCLA cost recovery action against a number of the generators at the Site, including various federal entities and Alcan. It settled with the federal entities and all third party generators with the exception of Alcan. The government sought to impose joint and several liability for all of the remaining costs at the Site, which vastly exceeded what Alcan's share would have been on a pure volumetric basis alone. No effort was made to assign responsibility to potentially responsible parties ("PRPs") based on toxicity. In fact, Alcan's waste was a non-hazardous water-mineral oil emulsion that contained none of the chemicals identified by the EPA as hazardous substances under CERCLA that necessitated remediation. The district court entered judgement against Alcan on May 8, 1991 and Alcan appealed to the Court of Appeals for the Third Circuit. The Third Circuit vacated judgement and remanded the case.

Upon remand, the case was assigned to then newly appointed Judge Thomas Vanaskie, who, peculiarly enough, had formerly served as defense counsel for the very operator (Mahler) accused of illegally dumping waste, including Alcan's, down the bore-hole into the mine. Judge Vanaskie neither disqualified himself from presiding over the cost recovery case against Alcan, nor did he fully disclose his conflict of interest to the parties. It is important for this Court to note that at the time of Mahler's criminal prosecution, Alcan presented testimony that was clearly adverse to Judge Vanaskie's then client.

During proceedings on remand, Judge Vanaskie's partiality and bias became more and more apparent by comments made by him in opinions that

suggested he had specific personal knowledge concerning the motivations and conduct of Mahler. The only impact of the Alcan waste at the Site was the substantive equivalent of homogenized milk, a fact which the United States now candidly admits it has never disputed.

In its appeal on the recusal issue, Alcan suggested to the Third Circuit that Judge Vanaskie's impartiality was highly suspect and that the Alcan emulsion was innocuous. The Third Circuit panel refused address these issues explicitly, instead choosing to attempt to avoid accountability through its use of an unpublished, non-precedential, single word affirmance.

Meanwhile, a case involving the exact same waste was proceeding in U.S. District Court for the Northern District of New York. In that case, the government expert testified that the Alcan emulsion, like that disposed at the Butler Site, had the functional equivalent impact on the New York site as homogenized milk. In addition, media attention was being drawn to the questionable judicial conduct in the Butler Site case.

The United States then filed this second cost recovery case before Judge Vanaskie alleging the need for additional funds for an early warning system to detect future releases of potential waste from the Butler Site.[1] Alcan requested that Judge Vanaskie disclose his prior connection to any representation in

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[1] The government made this decision with respect to the Butler tunnel while offering testimony in the New York litigation that all the waste had already been washed out of the tunnel.

connection with the Site. This was the first time that Judge Vanaskie had made disclosure of his role on the record. Only as a result of these disclosures was Alcan able to determine that Judge Vanaskie had been actively engaged in prior legal representation of client interests at the Butler Site--interests that were adverse to Alcan's own. Under the prevailing and explicit law of the Third Circuit, it is clear that Judge Vanaskie was obligated to recuse himself on his own motion. He steadfastly refused to acknowledge both his legal obligation and ethical obligations under the Canons of Judicial Ethics to do so. Alcan moved for recusal. Recusal was denied.

Alcan subsequently filed a writ of mandamus to the Third Circuit on the recusal issue. The writ was denied on a vote of two to one. The appellate panel, again like the prior single-word affirmance, provided no explanation as to why the Third Circuit was refusing to apply the law. Alcan sought a rehearing and a rehearing *en banc* seeking not only reconsideration, but asking, at the very least, for an explanation from the appellate court why Alcan's understanding of the law was incorrect.

Alcan's motion was denied upon an undisclosed vote. This petition now follows.

REASONS FOR GRANTING THE WRIT OF MANDAMUS

I. THIS COURT SHOULD GRANT THIS WRIT TO ENSURE INTEGRITY OF THE JUDICIAL PROCESS

The viability of the judicial functions of our nation absolutely depends on the integrity of the

judicial process. The foremost foundation of our judicial process is the impartiality of the elected or appointed judiciary. No greater attack on that integrity and that foundation exists than the unethical bias or partiality of judges. The only greater attack on judicial integrity is the failure of the appellate process in its duty to enforce recusal when faced with the bias and partiality of a trial judge under its supervision.

Public attention has already been focused to this case because of the suspicious conduct of the judiciary.[2] Alcan was never given its day in court on remand despite the fact that none of the hazardous substances that were driving the Butler Site remediation were in its waste emulsion. Instead, the trial court granted the government's motion for summary judgment based on their specious assertion that Alcan was unwilling to litigate the merits of its divisibility claim. That assertion was patently false, since Alcan was in fact litigating similar claims about the exact substance before the Northern District of New York involving many of the same witnesses deposed in connection with the remand in the Butler Site case.

Indeed, the case on the Butler Site was a simpler case to litigate. The nature of the wastes requiring remediation at Butler rendered impossible any attempt by the United States to obscure the essential fact that the government was seeking imposition of joint and several liability under Superfund for the exclusive impact of water. Although attempting to disguise the basis for his ruling on remand in legal jargon, Judge Vanaskie totally

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[2] Brigid McMenamin, *Justice in the Dark*, FORBES, Oct. 30, 2000, at 72-3; Bruce Rubenstein, *Controversial Cases Disappear*, CORPORATE LEGAL TIMES, Nov. 1999, at 30.

disregarded the requirement hazardous substances be the basis for CERCLA liability instead imposing liability for water.

The first appellate panel to review the decision made on remand by Judge Vanaskie was comprised of Circuit Judges Nygaard, Lewis and McKee. This panel attempted to avoid the mandate of the original holding of the Third Circuit (without recourse to an *en banc* review) by hiding the substance of their deliberation and decision-making in an "unpublished, non-precedential" single word opinion that affirmed Judge Vanaskie.

The attempt by Judge Vanaskie and the Third Circuit panel in *United States v. Alcan Aluminum Corp.*, 892 F. Supp. 648 (M.D. Pa. 1995), *aff'd* 96 F.3d 1434 (3rd Cir. 1996), *cert. denied* 521 U.S. 1103 (1997)("*Butler II*") to cloak the basis for their opinion has now been exposed. With the decision of the District Court in the Northern District of New York explicitly holding Alcan liable for water, now reveals water as the only possible basis for liability since it was the only characteristic of the emulsion at issue at the Butler Site.

II. FAILURE OF THIS COURT TO GRANT THIS WRIT WILL PUT THE *IMPRIMATUR* OF THIS COURT ON CONDUCT THAT CONSTITUTES A CLEAR VIOLATION OF THE EQUAL PROTECTION CLAUSE

Judge Vanaskie permitted the imposition of liability against Alcan for water in what can only be an apparent retaliation for Alcan's previous adverse testimony against his former client, Russell Mahler. The Third Circuit's failure to require Judge Vanaskie's recusal has created the peculiar situation whereby

other litigants with far higher toxic wastes can now rely on *Alcan* precedent on divisibility of harm and apportionment of damages to avoid joint and several liability under CERLCA. Yet, bizarrely enough, the effect of the same precedent results in the imposition of joint and several liability under CERCLA against Alcan for the disposal of innocuous waste that is essentially water.

In *United States v. Hercules, Inc.*, 247 F.3d 706 (8th Cir. 2001), the Eighth Circuit recently relied upon the *Alcan* precedent from *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 269 (3rd Cir. 1992)("*Butler I*") to overturn the imposition of joint and several liability on a PRP who disposed of PCBs. The Eighth Circuit stated this about the divisibility doctrine:

> ...[W]e find it to be both compatible with the text and the overall statutory scheme of CERCLA (*footnote omitted*) and a sensible way to avoid imposing on parties excessive liability for harm that is not fairly attributable to them.

It also cited the unpublished, non-cite-able opinion in *Butler II* for the proposition as to when divisibility is inappropriate. *Hercules* at 718. However, the Eighth Circuit was not aware of the actual facts in *Butler II* which are now undisputed, that is, that neither party disputed that the emulsion was the substantive equivalent of homogenized milk. [3] Thus, as the law is being applied in the United States today, if you have a

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[3] "The United States has never disputed that Alcan's waste oil emulsion may share some of the same characteristics as milk." United States' Response to Defendant's Motion for Relief from Judgement", p. 10.

serious hazardous waste, Alcan's precedent in *Butler I* can protect you from the automatic imposition of joint and several liability and, in fact, in most cases joint and several liability can thereby be avoided. However, if you are Alcan and disposed something substantively equivalent to homogenized milk you are automatically held jointly and severally liable. Only a perversion in the judicial process could create such anomalous and contradictory results.

III. JUDGE VANASKIE'S PARTIALITY IS CLEARLY ILLUSTRATED BY HIS COMMENTS IN THE REMAND CASE THAT EXPLICITLY REJECT CHEMICAL CHARACTERISTICS OF THE WASTE AS RELEVANT AND THAT INSTEAD INJECT THE SUBJECTIVE INTENTION OF HIS FORMER CLIENT AS A BASIS FOR THE IMPOSITION OF LIABILITY

In *Butler I*, the Third Circuit explicitly focused on the role of hazardous substances in determining the extent of Alcan's or any PRP's liability. It stated in this respect:

> ...[I]f Alcan can establish that the hazardous substances in its emulsion could not, when added to other hazardous substances, have caused or contributed to the release or the resultant response costs, then it should not be liable for any of the response cost. *Butler I*, 964 F. 2d at 271

Moreover, the recent *Acushnet Company, et al v. Mohasco Corp., et al*, 191 F.3d 69 (1st Cir. 1999) decision in the First Circuit applies the same principle first articulated in *Butler I* by the Third Circuit and which was adopted by the Second Circuit in *United*

States v. Alcan Aluminum Corporation, 990 F. 2d 711 (2nd Cir. 1993) involving the same waste. Consequently, the First Circuit not only flatly rejects the notion that CERCLA liability can attach for non-hazardous substances, but clearly holds that CERCLA liability cannot attach for minimal amounts of hazardous substances that have no practical relationship to the remediation:

> ...a defendant may avoid joint and several liability for response costs in a contribution action under §9613(f) if it demonstrates that its share of hazardous waste deposited at the site constitutes no more than background amounts of such substances in the environment and cannot concentrate with other wastes to produce higher amounts. *Acushnet*, 191 F.3d at 77.

However, Judge Vanaskie explicitly rejected the nature of the waste as relevant to any consideration of liability, instead holding that one's payment for waste disposal and the subjective intentions of the disposal company alone are the determinants of liability:

> Alcan's assertion [that the waste is benign] begs the questions of why Alcan paid to have a waste hauler to remove the emulsion and why the waste hauler surreptitiously dumped the emulsion into a mine borehole.

United States v. Alcan Aluminum Corporation, No 89-1657, (M.D. Pa. Oct. 4, 1995), Memorandum and Order, p. 4.

Judge Vanaskie is inferring the nature of the waste from his client's conduct or perhaps his refusal to

address the benign nature of Alcan's waste cloaks a more questionable agenda. Two points are undisputed. Judge Vanaskie is clearly intent upon imposing liability and the object of that liability is the substantive equivalent of homogenized milk.

IV. THE THIRD CIRCUIT HAS STEADFASTLY REFUSED TO EXPLAIN ITS CONDUCT IN THIS CASE WHICH CLEARLY SUGGESTS THAT ITS CONDUCT IS BEYOND LEGITIMATE EXPLANATION

In an interview with *Corporate Legal Times*, the Chief Judge of the Third Circuit, who argues forcefully in favor of unpublished opinions, concedes that opinions without explanation are problematic:

> Judge Becker argues forcefully in favor of unpublished opinions but concedes that one-word judgment orders such as the one issued by the Alcan panel are a mistake...[W]e owe the bar more than that.[4]

This case appears to be imbedded with one-word opinions even though the propriety of judicial conduct is clearly at issue. In *Butler II*, the appellate panel appeared intent on not following the mandate of *Butler I* and used the single word "affirmed" to circumvent an explanation that would have likely disclosed the extent of Judge Vanaskie's prior involvement in the defense of Mahler. It would also have highlighted the fact that the panel was imposing CERCLA liability for the substantive equivalent of disposing of homogenized milk rather than actually considering the role of

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[4] RUBENSTEIN, *Supra*, at 30.

hazardous substances as the panel in *Butler I* required.

A. The More Facts That Are Disclosed The More Extreme The Position Of The Third Circuit Becomes.

Time has not been kind to the Third Circuit. The more facts are revealed, the more controversial the conduct of the Third Circuit appears. The *Amicus* brief filed by the Washington Legal Foundation (WLF) and numerous public officials as well as private institutions demonstrates the extreme distortion of established legal doctrine required to reach the decision adopted by Judge Vanaskie and then approved by the panel in *Butler II*. As the brief points out, the effect of the decision of the second panel in approving the action of Judge Vanaskie is a wholesale rejection of the Third Circuit's clear recognition that divisibility would almost certainly apply. *United States v. Alcan Aluminum Corp.*, 964 F. 2d 252, 269, n. 27 (3d Cir. 1992) ("the drafters of the Restatement found that joint pollution of water is typically subject to the divisibility rule.") Judge McAvoy's decision in the Northern District of New York adopts the legal standard of Judge Vanaskie and contains a more detailed look at the legal justification for Vanaskie's doctrine. *United States v. Alcan Aluminum Corporation*, 97 F. Supp 2d 248, 269. The *Amicus* brief filed by the WLF reveals McAvoy's analysis to be a wholesale distortion of the divisibility doctrine:

> The district court took a crabbed view of the divisibility concept in order to avoid ...[the Second Circuit's] admonition that "commingling does not mean indivisibility." The error of the court can be found by analyzing its faulty reasoning from the

following key passages in the district court's opinion:

> The Second Circuit adopted the Restatement (Second) of Torts definition of divisibility, which states that harm is divisible where "joint tortfeasors act independently and cause *distinct* harm, for which there is a reasonable basis of division according to the contribution of each." Prosser and Keeton explain that where two or more causes combine to produce a single indivisible result, liability cannot be apportioned. 97 F. Supp. 2d at 271 (emphasis added).

Unfortunately, the district court was only half right. Its quotation of the Restatement omitted a key passage, as a cursory look at section 433A reveals:

> § 433A. Apportionment of Harm to Causes
>
> (1) Damages for harm are to be apportioned among two or more causes where
>
> (a) there are distinct harms, *or*
>
> (b) there is a reasonable basis for determining the contribution of each cause to a single harm. *Id.* (emphasis added).

The WLF brief concludes that the district court in New York constructed faulty major and minor premises to leap "to a wholly unsound conclusion." Desperately trying to conceal the fact that Judge

Vanaskie's reasoning would fare no better, the Third Circuit cloaks it in the shroud of a single word affirmance. Unless remedied by this Court, the Third Circuit's stubborn refusal to acknowledge any irregularities in the manner in which this case has been handled will continue to erode the prestige and credibility of the judicial system:

> It is submitted that the federal appellate courts have blinded themselves [by use of unpublished nonprecedential opinions] from hundreds of snapshots from their own history in violation of the First Amendment. The negative implications for judicial accountability and for the prestige and credibility of the judicial system seem clear beyond dispute.[5]

B. The Third Circuit Has Steadfastly Refused to Explain Its Refusal to Follow Its Own Precedent And Is Another Example Of The Growing Belief Among Federal Jurists That Silence Relieves Them Of Their Duty To Follow Precedent And To Be Accountable

Both controlling precedent and the conduct of other federal judges demonstrates beyond dispute that recusal was required in this case. Alcan has specifically asked both the members of the Third Circuit panel who voted not to require recusal and the Third Circuit, *en banc*, to explain the basis for why they disagreed with Alcan. Such explanation has not been forthcoming. Alcan believes that an explanation has not been forthcoming, not because Alcan is

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[5] SALEM M. KATSH & ALEX V. CHACHKES, *Examining the Constitutionality of No Citation Rules*, N.Y.L. J., Apr. 2, 2001.

obviously wrong, the widespread *Amicus* support in the corresponding case in New York certainly makes that position untenable, but rather because the Third Circuit has no justifiable explanation for its conduct.

A judge must disqualify himself where his impartiality might reasonably be questioned or where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. 28 U.S.C. §455

Two cases clearly demonstrate that automatic recusal is required under facts far less compelling than those in this case. The first case involved an automatic recusal even though the judge's recollection of the involvement was far more tentative than that of the trial court's involvement in this case. *Liljeberg v. Health Services Acquisition Group*, 486 U.S. 847 (1988). The second case was based exclusively on association with an office that represented a party even though the judge apparently had no involvement with the case at all. *United States v. Stringfellow, et al.*, CV83-2501, United States District Court for the Central District of California.

This Court set out the standard for recusal in *Liljeberg v. Health Services Acquisition Corp*, 486 U.S. 847, 860-61 (1988) as follows:

> If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge's actually has no interest in the case or because the judge is pure in heart and incorruptible.

There is no dispute that Judge Vanaskie meets the "personal and extrajudicial" requirements since he testified that he remembered representing Russell Mahler, and it was, of course, in his capacity as an attorney that he did so. How direct Judge Vanaskie's involvement was in the representation remains in question due to the weak recollections of Judge Vanaskie, Mr. Morey, and Mr. Warren of the precise facts surrounding the Judge's involvement with Mahler and the Mahler related companies. Nonetheless, it is clear he was present during the entire criminal trial of Mahler's associates. However, this failure to recall the level of involvement in such a case is not a basis to preclude recusal. *Id.*

Judge Vanaskie served as defense counsel for one or more of the directly responsible parties who illegally contaminated the Butler Site. Therefore, in addition to the "impartiality" shown under the *Liljeberg* standard noted above, Section 455 (b)(2) makes it clear that once a party serves as a lawyer in the matter in controversy, the extent or degree of representation is irrelevant, and recusal is therefore mandated. There is no dispute that Judge Vanaskie served as a lawyer in the matter in controversy and that his client or clients would have had interests adverse to Alcan's due to the fact that Alcan appeared in the criminal action as a witness adverse to the former client's interest.[6].

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[6] Notably, the United States did not bring a cost recovery action against Hudson Oil as an owner operator or transporter for cost recovery. This is an interesting contrast with *United States v. J. B. Stringfellow et. al* where the United States sued the owner operator and transporters. The fact that an interested plaintiff chose not to name Mahler or his companies in the cost recovery action does

Under the established facts, recusal is not only required in this case it is mandated. This conclusion not only derives from the facts of this case, but from the actions of other federal judges in disqualifying themselves under less compelling circumstances in connection with other Superfund actions.

The automatic operation of this rule of recusal is well-illustrated in the ongoing Superfund recovery action entitled *United States v. J.B. Stringfellow*[7]. Judge Nora M. Manella automatically recused herself from the litigation simply because she was in the US Attorney's Office while it represented the United States in the action. There is no mention that she was actually involved in the litigation at all. Recusal was automatically ordered by Judge S. W. Lett because one of the parties to the litigation was a former employer, and the judge "believed" he worked on some aspect of the case. Moreover, as noted previously, recusal under these circumstances cannot be waived.[8]

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not change the reality that they were PRPs and that involvement in litigation involving accountability for the Site would have been adverse to Alcan.

[7] United States District Court for the Central District Of California, CV 83-2501.

[8] 28 U.S.C. §455(b); S*ee also, In Re School Asbestos Litigation*, 977 F.2d 764 (3d Cir. 1992) stating "Most relevantly, disqualification is required when there is 'a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.' 28 U.S.C. §455(b)(1). While the parties may, after full disclosure on the record, waive the grounds of disqualification under subsection (a), a judge may not accept a waiver of the grounds listed in subsection (b)." *Id.* at 775.

V. THE CASES RELIED UPON BY THE DISTRICT COURT DO NOT EVEN ARGUABLY OBVIATE THE REQUIREMENT FOR RECUSAL UNDER 455(b), BUT RATHER SUPPORT ALCAN'S POSITION

In its Memorandum Decision, the trial court cited two cases to support the propositions that recusal is not required. These cases do not support the proposition for which they are offered and, in fact, support Alcan's position that the trial court should have recused himself in this case.

In the first case, *Little Rock School District v. Pulaski County Special School District No. 1*, 839 F.2d 1296 (8th Cir. 1988), the judge did not recuse himself. However, the facts in *Little Rock* are clearly distinguishable. In that case, the judge was a member of a firm which filed an amicus brief on behalf of another party in a civil rights case that was not before him. The party seeking recusal claimed that since there was an attempt to consolidate that third party in the case before the judge that constituted the same matter. The case was not consolidated. The appellate court disagreed and although it mentioned the differences in the case numbers, it was clear that the decision fundamentally relied upon the fact that the judge's prior firm did not represent the third party and that there was no evidence that the legal issue arose from the same set of facts.

In this case, Judge Vanaskie defended Mahler in the companion criminal case *for the very actions* (hauling and dumping into the Butler Mine Tunnel bore-hole) that created Alcan's liability at the Site. Crucially, Alcan participated in those proceedings in a manner that was directly adverse to the interests of Judge Vanaskie's former client.

In *United States v. Cleveland*, No. Crim. 96-207, 1997 U.S. Dist. LEXIS 6348 (E.D. La. 1997), the judge wrote a memorandum on legal issues which the firm used to evaluate whether or not to represent the client. The firm ultimately did not represent the client involved in the purported conflict, and rather than relying on the legal memorandum as the basis for holding that recusal was not required, the court relied upon the lack of representation.

Judge Vanaskie relied on *Cleveland* to support an argument that §455(b) does not require recusal when a judge's role is limited to simply legal research and brief writing which he claims is all he can recall.[9] The rule does not carve out such an exception. Moreover, Judge Vanaskie did not simply engage in brief writing as the Judge in *Cleveland* did. Judge Vanaskie engaged in active legal representation for the same person whose activities are central to the case he was trying on remand. What Mahler hauled and where he hauled it are the main items of proof in this case. Again, Alcan's testimony in those proceedings, which Judge Vanaskie admittedly attended as counsel for Mahler, contributed to the criminal conviction of that client. The clear conflict in this case cannot be explained away.

VI. COMMENTS BY THE DISTRICT COURT IN ITS RULING IMPLIED THAT IT INCORPORATED VIEWS DEVELOPED IN THE CONTEXT OF ITS PREVIOUS REPRESENTATION OF THE CULPABLE PARTY

The fact that Judge Vanaskie's evaluations of purely technical issues were infected with views about

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[9] In many respects the absence of a firm recollection is more troubling than an affirmative recollection.

the conduct of his former client are blatant. In addressing what should have been a simple technical issue *i.e.*, the benign biodegradable characteristics of Alcan's waste emulsion, Judge Vanaskie injects into that analysis the motivation of his former client:

> Alcan's assertion [that the waste is benign] begs the questions of why Alcan paid the waste hauler to remove the emulsion and why the waste hauler surreptitiously dumped the emulsion into the borehole.[10]

Clearly, Judge Vanaskie is not focusing on the technical characteristics of the waste in an objective manner, but inferring its character from the conduct of his former client. We will never know the extent his opinion was tainted by his knowledge of unsavory conduct of his client, like the fraud at the Brooklyn Navy Yard.[11] What Alcan does know, as undisputed fact, is that vastly higher quantities of the emulsion disposed at the Butler Site was land-spread at the Sealand Site in upstate New York where the United

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[10] *United States v. Alcan Aluminum Corporation*, No. 89-1657, Memorandum and Order at p. 4. (M.D. Pa. Oct. 4, 1995).

[11] In the deposition of Kenneth Mansfield, a Mahler employee, testified that the United States routinely sent out purchase orders for disposal of materials from the bilge of destroyers at the Brooklyn Naval Yard he characterized as "diesel fuel". He stated he was under instructions to stay and make believe he was pumping so that no one would suspect that the government was paying Mahler for purchase order volumes far in excess of the volume actually pumped. A-31.

States Environmental Protection Agency conceded there was no adverse environmental impact.[12]

VII. THE THIRD CIRCUIT HAS PUBLICLY INDICATED THAT ITS FAILURE TO EXPLAIN ITS DECISION IN THE PRIOR CASE WAS AN ERROR SINCE IT OWED THE BAR MORE; NOW WHEN THE FAIRNESS OF THE PROCESS OF THAT CASE IS PUT INTO ISSUE, IT APPEARS TO REVERT TO THE SAME COVERT BEHAVIOR TO AVOID EXPLAINING ITS CONDUCT

In New York, Alcan was also held jointly and severely liable for disposing a water emulsion whose impact on a waste site was no different than if it had disposed homogenized milk. In a Motion for Relief From Judgment before Judge Vanaskie stemming from the testimony of an EPA witness (taken in the corresponding remand case before the Northern District of New York involving the same waste), the government's expert, Dr. Meyer, conceded that the impact of the emulsion was no different than that of milk. A-41. Furthermore, the United States also conceded that the emulsion was no different than homogenized milk:

> Alcan contends that the United States misled this Court in Alcan-Butler Tunnel I, because both Alcan's waste oil emulsion and milk cause other hazardous substances to migrate. Indeed, it is the quality of milk and other bulk liquids to make more environmentally harmful substances migrate that constitutes one of the principal bases for the United States claims. The crucial distinction, however, is

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[12] See testimony of government witness, Mr. Nunez. A-33.

> that milk is not a hazardous substance actionable under CERCLA while Alcan's emulsion is.[13]

It is remarkable that the United States concedes that milk is not a hazardous substance actionable under CERCLA even though it contains higher concentrations of similar metal compounds that triggered liability for the Alcan emulsion than were actually contained in that emulsion. As the Third Circuit noted in *Butler I*:

> As Alcan asserts, this definition of "hazardous substances" effectively renders everything in the universe hazardous including, for example, federally approved drinking water. When this definition is read in conjunction with the rule that specific causation is not required, CERCLA seemingly would impose liability on every generator of hazardous waste, although that generator could not, on its own, have caused any environmental harm.

United States v. Alcan Aluminum Corporation, 964 F.2d 252, 267 (3d Cir. 1992).

Second, Dr. Meyer's deposition referenced during Meyer's cross-examination in the New York case, was taken in connection with *this case*. This undisputed evidence is precisely what Alcan put before Judge Vanaskie to support the theory that Alcan's waste was nothing more than the substantive equivalent of milk and therefore no liability for

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[13] *United States v. Alcan Aluminum Corporation*, (D.C.Pa.) No. 99-CV-1160) United States Response to Defendant's Motion For Relief From Judgment, pp. 11-12.

remediation costs should attach. Why then did this undisputed testimony that joint and several liability was being imposed for something whose impact on the Site was substantially equivalent to milk appear nowhere in the published court opinions in that case? Certainly, this would have been of interest to the Eighth Circuit who recently reversed a district court decision in *United States v. Hercules, Inc., et al.*, 247 F.3d 706 (8th Cir. 2001) permitting divisibility for dioxin, citing *United States v. Alcan, 990 F.2d 711, 722 (2d Cir. 1993)* (*Alcan II*). The 8th Circuit also cited *Alcan III (United States v. Alcan, 892 F. Supp. 648 (M.D. Penn. 1995)* for the statement by Judge Vanaskie that Alcan took an "all or nothing approach" and therefore construing the Judge's opinion to indicate that Alcan had not offered any compelling evidence with respect to its waste and the divisibility issue. *Hercules at* 718.

In fact, what Alcan did was offer very compelling testimony given by the government's own expert witness. Judge Vanaskie chose to ignore the relevant evidence and facts and simply to make a ruling without reference to Alcan's waste being the equivalent of milk. Therefore, the Eighth Circuit Court of Appeals did not know that it was undisputed in *Alcan III* that the emulsion was just like homogenized milk. Thus, the Eighth Circuit effectively held in its opinion that it would permit divisibility of harm for dioxin while not being permitted to understand that divisibility of harm for a substance like milk was actually being denied by the Third Circuit.

In a site composed of 1,100 gallons of waste—1,000 gallons of milk from Party A, 50 gallons of dioxin from Party B, and 50 gallons of dioxin from Party C, the liability of B and C would never be more than 50 percent, but the liability of A would be 100

percent. Using such a volumetric assessment, the liability of B and C would never be more than 4.5 percent each. The Eight Circuit would never have intended such a result had it known the facts. Yet, that is the consequence of lack of candid disclosure by the district court in *Alcan III*. Nor did the Eight Circuit in relying upon *Alcan III* know that the district court judge who wrote the opinion never admitted to the fact that he was imposing liability and ignored divisibility for something as benign as milk and was the former defense counsel for the party who illegally dumped the waste and against whom Alcan provided adverse testimony.

If the United States' assertion in this case that it never misled the district court, and openly agreed that Alcan's emulsion was just like milk, then Judge Vanaskie had to intentionally distort the facts to render his opinion in that case (*Alcan III*)—that alone should be sufficient evidence of bias to require disqualification.

This Writ is required not only because of fairness to Alcan, but because the present state of affairs impairs the credibility and integrity of the entire legal process.

CONCLUSION

For the foregoing reasons, this Writ of Mandamus should be granted.

Dated: September 18, 2001

Respectfully submitted,

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

(Filed Feb. 07, 2001)

UNITED STATES OF AMERICA
Plaintiff

NO 3 CV 99-1160

V.

Chief Judge
Vanaskie

ALCAN ALUMINUM
CORPORATION
Defendant.

MEMORANDUM

In this cost recovery action under sections 107 and 113 of the Comprehensive. Environmental Response; Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§9607, 9613, defendant Alcan Aluminum Corporation ("Alcan") has moved for my disqualification under 28 U.S.C §455(a) and (b)(2). Alcan's motion is based upon the fact that, as an associate in a Philadelphia law firm approximately twenty (20) years ago, I participated in the firm's representation of an entity that disposed of hazardous waste at the site at issue in this case. Specifically, at the direction of the partner in charge of the waste hauler client, I performed some work in connection with state criminal proceedings pertaining to the waste haulers activities at the site. Alcan presents this motion notwithstanding the fact that in a prior cost recovery action against Alcan involving the same site and over which I presided, United States v. Alcan Aluminum Corp., 892 F.Supp. 648 (M.D.Pa. 1995), aff'd mem., 96 F.3d 1434 (3d Cir. 1996), cert. denied, 521 U.S. 1103 (1997), I informed the parties of my

knowledge of the site and the basis for that knowledge, and Alcan did not take any action at that time to ask that I step aside.[1] Because (a) the waste hauler in question is not a party to this case, (b) my limited work on behalf of the waste hauler did not concern the matter in controversy here, (c) the long passage of time since I did any work on behalf of the waste hauler, and (d) Alcan voiced no objection to my presiding in a related case decided almost five years ago, Alcan's motion for disqualification will be denied.

I. BACKGROUND

As indicated above, this is the second action commenced by the United States against Alcan to recover environmental remediation costs incurred by the United States Environmental Protection Agency ("EPA") at the Butler Mine Tunnel Superfund Site ("the Site") located in Pittston Township, Luzerne County, Pennsylvania. As stated by the Third Circuit on the first occasion that it addressed this matter, United States v. Alcan Aluminum Corp., 964 F.2d 252, 255-57 (3d Cir. 1992), the pertinent facts are as follows:

> The Butler Tunnel Site. . . includes a network of approximately five square miles of deep underground mines and related tunnels, caverns, pools and waterways bordering the east bank of the Susquehanna River in Pittston, Pennsylvania. The mine workings at the Site are drained by the Butler Tunnel (the "Tunnel"), a 7500 foot tunnel which feeds directly into the Susquehanna River. The mines are accessible from the surface by numerous air shafts or boreholes. One borehole (the "Borehole") is

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[1] The first action will at times be referred to herein as "Alcan I."

located on the premises of Hi-Way Auto Service, an automobile fuel and repair station situated above the Tunnel. The Borehole leads directly into the mine workings at the Site.

In the late 1970's, the owner of Hi-Way Auto Service permitted various liquid waste transport companies, including those owned and controlled by Russell Mahler (the "Mahler Companies"), to deposit oily liquid wastes containing hazardous substances into the Borehole. [FN1] The Mahler Companies collected the liquid, wastes from numerous industrial facilities located in the northeastern United States and, in total, disposed of approximately 2,000,000 gallons of oily wastes containing hazardous substances through the Borehole. [FN2] Apparently, it was contemplated that the waste would remain at the Site indefinitely.

> FNI. The Mahler Companies are said to be government-licensed waste processors. Amicus Curiae the United States Chamber of Commerce. Br. at 6.
>
> FN2. On occasion, the Mahler Companies commingled Alcan's oily waste with other waste at Mahler's recycling facilities located in Syracuse, New York, and Edgewater, New Jersey, before disposing of the waste through the Borehole.

Alcan is an Ohio corporation which manufactures aluminum sheet and plate products in Oswego, New York. From 1965 through at least 1989, Alcan's manufacturing process involved the hot-rolling of aluminum

ingots. To keep the rolls cool and lubricated during the hot-rolling process, Alcan circulated an emulsion through the rolls, consisting of 95% deionized water and 5% mineral oil. At the end of the hot-rolling process, Alcan removed the used emulsion and replaced it with unused emulsion.

During the rolling process, fragments of the aluminum ingots, which also contained copper, chromium, cadmium, lead and zinc, hazardous substances under CERCLA, broke off into the emulsion. In an effort to remove those fragments, Alcan then filtered the used emulsion prior to disposing of it, but the filtering process was imperfect and hence some fragments remained. According to Alcan, however, the level of these compounds in the post-filtered, used emulsion was "far below the EP toxic or TCLP toxic levels and, indeed, orders of magnitude below ambient or naturally occurring background levels. Moreover, the trace quantities of metal compounds in the emulsion [were] immobile...." Appellant's Br. at 4. The Government does not specifically challenge Alcan's assertion that the used emulsion contained only low levels of these metallic compounds, as it contends that this fact is irrelevant to Alcan's liability under CERCLA.

From mid-1978 to late 1979, Alcan contracted with the Mahler Companies to dispose of at least 2,300,950 gallons of used emulsion from its Oswego, New York, facility. During that period, the Mahler Companies disposed of approximately 32,500-37,500 gallons (or five

6500-7500 gallon loads) of Alcan's liquid waste through the Borehole into the Site. [FN3]

> FN3. Although Alcan has argued that the Government did not prove that its emulsion was actually at the Site because it did not establish the presence of chromium, this does not preclude Alcan's liability under CERCLA, for even assuming arguendo that there was no chromium at the Site, Alcan has admitted that "the Mahler companies disposed of. . . the Alcan emulsion through the Borehole into the Site.'" App. at 36. Alcan asserts that it was not aware that Mahler was disposing of the oily waste in this fashion, but the Government does not contend otherwise, and in any event Alcan does not contend that this should affect our result.

In September. 1985, approximately 100,000.gallons of water contaminated with hazardous substances were released from the Site into the Susquehanna River. It appears that this discharge was composed of the wastes deposited into the Borehole in the late 1970's. Between September 28, 1985, and January 7, 1987, EPA incurred significant response costs due to the release and the threatened release of hazardous substances from the Site. According to the Government, EPA's response actions included "containing an oily material" on the river through the use of absorbent booms;

immediately removing and disposing of 161,000 pounds (over 80 tons) of oil and chemical-soaked debris and soil, monitoring, sampling and analysis of air and water, and conducting hydrogeologic studies." Government's Br. at 10-11.

On December 27, 1985, EPA issued written information requests to potentially responsible parties ("PRPs"), including Alcan, concerning their responsibility for the presence of hazardous substances at the Site. In May and June of 1986, EPA issued letters to the PRPs informing them of their potential liability under CERCLA. Those letters invited the PRPs to conduct a remedial investigation/feasibility study and to enter into an agreement with EPA for the issuance of an administrative order governing the study. Several PRPs conducted these negotiations with EPA in an attempt to settle their liability for removal costs incurred by the Government, but Alcan did not participate in this process.

In November 1989, the Government filed a complaint against 20 defendants, including Alcan, for the recovery of costs incurred as a result of the release of hazardous wastes from the Site into the Susquehanna River. In response, 17 of the 20 defendants executed a consent decree, reimbursing the Government for certain removal costs, and the district court entered that decree on January 17, 1990. On June 8, 1990, two of the three remaining defendants entered into a second consent decree with the Government, which the district court approved on July 25, 1990. The

Government then moved for summary judgment against Alcan, the only non-settling defendant, to collect the balance of its response costs. Alcan cross-moved for summary judgment, arguing that its emulsion did not constitute a "hazardous substance" as defined by CERCLA due to its below-ambient levels of copper, cadmium, chromium, lead and zinc, and further contending that its emulsion could not have caused the release or any response costs incurred by the Government.

In Alcan I, the Third Circuit rejected Alcan's arguments that it had no liability under. 42 U.S.C. §9607(a), but remanded the matter to determine whether Alcan could avoid or limit its liability as a result of the fact that its used oil emulsion had been commingled with other oily waste containing hazardous substances discharged from the Butler Mine Tunnel. The Court of Appeals indicated that if Alcan established that its used "emulsion did not or could not, when mixed with other hazardous waste, contribute to the release and the resultant response costs, then Alcan should not be responsible for any response costs." Id. at 270.

On remand, the matter was re-assigned to me. As Alcan concedes, I informed the parties that in the early 1980's the firm with which I was associated represented Russell Mahler and Hudson Oil Company (one of the Mahler Companies), and I had done some work in connection with criminal proceedings that had been brought against the owners of Hi Way Auto Service (which was not a firm client and for whom I did not render any services), as well as criminal proceedings brought against Mahler and/or Hudson

Oil.[2] Neither the United States nor Alcan raised any question as to the propriety of my handling the matter based upon this limited representation that had occurred more than a decade before I became a federal judge.

Ultimately, I found that Alcan had not carried its burden of proof on the question of apportionment of liability and awarded the government the full amount of its cost-recovery claim, $473,790.18. 892 F.Supp. 648. The Court of Appeals for the Third Circuit affirmed, without opinion, 96 F.3d 1434 (3d 'Cir. 1996), and the Supreme Court denied certiorari. 521 U.S. 1103 (1997).

On June 2, 1998, Alcan filed a complaint in the United States District Court for the District of Massachusetts, seeking contribution for costs it has incurred and naming as defendants, inter alia, various agencies of the United States government. On July 1, 1999, the United States filed this action ("Alcan II"), seeking approximately $600,000 in unreimbursed costs incurred from June, 1989 through February, 1999 in connection with the Site. The government claims that these costs were incurred by EPA for such activities as searches for potentially responsible parties ("PRPs"), preparation of the record of decision ("ROD") and proposed remedial plan, community relations activities, supervision of the remedial investigation/feasibility study ("RI/FS"), and an assessment by the Agency for Toxic Substances Disease Registry ("ATSDR").

Alcan has moved for dismissal of this action,

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[2] I did not make this disclosure on the record because I did not perceive that my prior limited involvement with a client that was' not a party to Alcan I warranted my disqualification under 28 U.S.C. § 455.

claiming that its action in the District of Massachusetts take precedence. The government has moved for partial summary judgment, contending that Alcan's liability has been established by virtue of the rulings in Alcan I. Alcan contests the preclusive effect of the final judgment in Alcan I, contending, *inter alia* that it was procured by fraud.

In the course of addressing the issues, Alcan suggested that my disqualification as the presiding judge may be warranted on the basis of my participation as an associate in my former firm's representation of Russell Mahler and/or one of his companies approximately twenty years ago. . In light of this development, I placed on the record at a case management conference conducted on November 4, 1999, my recollection of my limited participation in that representation of the waste hauler. (Transcript of November 4, 1999, Case Management Conference, (Dkt. Entry #17, at 2). Specifically, I recounted that I attended a criminal trial against the owners of Hi Way Auto Service and reported on the public proceedings to the partner representing Mr. Mahler and/or his waste hauling company. In that regard, I went to the outfall of the Butler Mine Tunnel on a jury view. I also related that I performed legal research in connection with efforts to extradite Mr Mahler and/or Hudson Oil from New Jersey to Pennsylvania. I informed counsel that the partner in charge was Attorney Morey Myers; that I had not attended any meetings with Mr. Mahler or any other representative of Hudson Oil Company; and that I was not involved in any factual investigation undertaken in connection with the representation of Mr. Mahler and/or his company.

On December 15, 1999, Alcan filed its motion for recusal. (Dkt. Entry #21). In this motion, Alcan's

counsel represents that he conferred with Attorney Myers and with another attorney, William Warren, whom Mr. Myers identified as having "primary responsibility" for the client.[3] According to counsel for Alcan, Mr. Myers had little recollection of the matter and Mr. Warren had confirmed that my participation was not extensive and that the firm's representation was limited to the corporate entity. While Mr. Warren could not confirm the fact that I attended the state court criminal trial of the owners of Hi Way Auto Service, he did confirm that, otherwise, my involvement in the matter was exclusively for legal research.[4]

II. DISCUSSION

Alcan seeks my disqualification under 28

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[3] Alcan did not submit an affidavit in support of its motion for disqualification, instead, it has relied upon the unsworn representations of Alcan's counsel as to his conversations with Attorneys Myers and Warren. Such unsworn averments are, of course, inappropriate on such a serious matter as a request for disqualification of the presiding judge.

[4] During the November 4, 1999 case management conference, I recollected that our firm represented Mr. Mahler and/or Hudson Oil Company. I also recollected that there were efforts made to prevent the extradition of Mr. Mahler. As noted above, Mr. Warren has indicated that the firm represented only the corporate entity, thereby revealing my faulty memory of a matter that occurred nearly two decades ago and in which my participation was limited. The absence of a clear recall is, of course, understandable given the passage of time. What is undisputed is that I did not directly represent Mr. Mahler and/or his Companies, and undertook no investigation with respect to the facts concerning the Mahler Companies' involvement with the Site.

U.S.C. § 455(a) on the basis of an appearance of partiality, and under § 455(b)(2) on the ground that as an attorney in private practice I was involved as a lawyer "in the matter in controversy...." Each basis for disqualification will be addressed separately.

A. Disqualification Under § 455(a)

Section 455(a) provides:

> Any justice, judge, or magistrate of the United States shall
> disqualify himself in any proceeding in which his impartiality
> might reasonably be questioned.

The standards for determining whether disqualification under § 455(a) is warranted were articulated in Alexander v. Primerica Holdings. Inc., 10 F.3d 155, 162 (3d Cir. 1993):

> For purposes of § 455(a) disqualification, it does not matter whether the district court judge actually harbors any bias against a party or the party's counsel. This is so because §455(a) concerns not only fairness to individual litigants, but, equally important, it concerns the public's confidence in the judiciary, which may be irreparably harmed if a case is allowed to proceed before a judge who appears to be tainted. To achieve its highest function, "'justice must satisfy the appearance of justice.'"
>
> The instruction to which we adhere "is designed to promote public confidence in

the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case." At the same time,

> In assessing . . . [the judge's] impartiality, [the] judge. . . must be alert to avoid the possibility that those who would question [the judge's] impartiality are in fact seeking to avoid the consequences of his expected .adverse decision. Disqualification for lack of impartiality must have a reasonable basis.... Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice. [Emphasis in. original.]

The essential premise of § 455(a) is "public confidence in the judicial system, both in the particular case and in general" In re School Asbestos Litig., 977 F.2d 764, 788 (3d Cir. 1992). "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 864(1988).

But the fact that a litigant questions, in good faith, a judge's impartiality does not mean that recusal is warranted. As stated in Varela v. Jones, 746 F.2d 1413, 1416(10th Cir. 1984):

'Although we acknowledge that the

> intent in amending § 455 was to negate even the appearance of partiality in judicial proceedings, § 455 (a) must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice.'

The test for disqualification is an objective one. The question is whether a reasonable person "'knowing all the circumstances would harbor doubts concerning the judge's impartiality.'" Edelstein v. Wilentz, 812 F.2d 128, 130 (3d Cir. 1987). "[T]he standard requires that the court consider the audience — 'the reasonable person' — as individuals tutored in the facts, 'knowing all the circumstances.'" Rosenberg .v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 976 F.Supp.84, 86 (D. Mass. 1997). "Just as a judge should remove him or herself from a case if the moving party raises sufficient allegations regarding the judge's bias, a judge has an affirmative duty not to recuse him or herself if the movant fails I to establish a reasonable doubt concerning his or her impartiality." Vangarelli v. Witco Corp., 808 F. Supp 387, 389 (D.N.J. 1992)(emphasis added). Accord Welch v. Board of Dirs. of Wildwood Golf Club, 918 F. Supp. 134, 138 (W.D. Pa. 1996).

Accordingly, the factual submissions of the parties should be scrutinized to assure that there is indeed an adequate foundation upon which to premise a reasonable doubt as to the judge's impartiality. See Vangarelli, 808 F.Supp. at 389. In short, a disqualification motion under §455(a) presents "a sensitive question of assessing all the facts and circumstances in order to determine whether'" the

sound exercise of judicial discretion calls for recusal.

In this case, sound judicial discretion, exercised in the context of the need to preserve the appearance of impartiality as well as "'the dignity of the bench, the judge's respect for the fulfillment of his judicial duties, and a proper concern for his judicial colleagues,'" Duke v. Pfizer, Inc., 668 F.Supp. 1031, 1035 (E.D. Mich. 1987), aff'd, 867 F.2d 611 (6th Cir. 1989) (quoting Advisory Comm. on Judicial Activities, Op 52(1977)), militates against disqualification. Specifically, the following facts are such that a reasonable person would not question my impartiality here:

- Neither Russell Mahler nor Hudson Oil Company were parties to Alcan I, and they are not parties to this case.[5]
- Alcan knew of my involvement with respect to Mahler and/or Hudson Oil Company in Alcan I and did not contest my participation as presiding judge at that

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[5] Alcan asserts that "[t]his cost recovery action by the United States will inevitably involve facts concerning the relationship between the plaintiff, Hudson Oil and related companies and Russell Mahler and the extent to which the plaintiff through its rela6onship with Mahler may have been in reality the most significant contributor to the problems at the Butler Site." (Mot. for Recusal at 3.) Alcan does not explain why such facts may become important in this litigation. Alcan eschewed the opportunity to apportion harm in Alcan I, and it is not clear that Alcan should be accorded the opportunity to apportion harm in this case. In any event, the relationship between agencies of the United States and Mahler's Companies was not a matter within the purview of the work that I did at the direction of the lawyers responsible for representing Hudson Oil.

time.[6]

- My participation in my prior firm's representation of Hudson Oil Company was limited to observing a state court criminal trial of the owners of Hi Way Auto Service and legal research in connection with state court criminal charges.
- My limited participation in my prior firm's representation of Hudson Oil ended in the early 1980's.
- The incident giving rise to Alcan I and this lawsuit, the discharge of approximately 100,000 gallons of contaminated water into the Susquehanna River, occurred in 1985, after any involvement I had in connection with my former firm's representation of Hudson Oil.
- At no time was I involved in efforts to seek "enforcement concessions" from government agencies? [7]

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[6] Alcan concedes that I raised the issue of my participation in my former form's representation of Mahler and/or his Companies off the record in Alcan 1, but contends that any waiver of disqualification under §455(a) was ineffective because my limited recall "would operate as inadequate disclosure as a basis for informed waiver." This assertion is without merit. Alcan was placed on notice in 1994 of the same grounds for disqualification on which it now relies. Alcan does not contend that it lacked the ability to investigate whether disqualification was warranted at that lime. Alcan cannot simply ignore the disclosure previously made, having failed to undertake any inquiry at that time, and now assert that its decision not to seek disqualification in Alcan I was uninformed.

[7] Alcan suggests that a basis for recusal is "[t]he possibility that the Court may have been involved on behalf of its former client or clients in seeking enforcement concessions from governments who might have granted those

Although each disqualification motion is necessarily sui generis, and thus to be decided on the basis of the peculiar facts and circumstances that undergird the disqualification motion, support for denial of Alcan's motion in this case can be found in the reported decisions of other courts. For example, in Cipollone v. Liggett Group, Inc., 802 F.2d 658 (3d Cir. 1986), the plaintiff, after suffering an adverse decision, moved to vacate the Third Circuit ruling on the ground that one member of the panel should have recused himself. As in this case, the ground for disqualification was the alleged appearance of partiality arising from the fact that a member of the panel, while in private practice, represented a tobacco company in a case involving a similar liability claim. As in this case, the former client was not a party to the action pending before the court. As in this case, the assailed judge's representation of the party in question had terminated long before the judge had assumed the Bench and before the occurrence of the events giving rise to the lawsuit in question. Judge Gibbons, writing for the Third Circuit, found no basis for disqualification, observing:

> Even if American Tobacco Company were a party to the Cipollone case, the long passage of time since Judge Hunter's last representation of that Company requires the conclusion that no reasonable person could question his impartiality. See, e.g.,

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concessions to avoid further implicating their activities in connection with the site...." (Motion for Recusal, at 3.) There is no evidence to support this speculative assertion, and disqualification may not be based on such pure speculation. See Mitchael v. Intracorp, Inc., 179 F.3d 847, 861 (10th Cir. 1999).

> Chitimacha Tribe of Louisiana v. Harry L. Laws Company, Inc., 690 F.2d 1157, 1166 (5th Cir.1982), cert. denied, 464 U.S. 814, 106 S.Ct. 69, 78 L.Ed.2d 83(1983) recusal not warranted where judge had represented the defendant in unrelated matters at least six years earlier); Jenkins v. Bordenkircher, 611 F.2d 162, 165-67 (6th Cir.1979), cert. denied, 446 US. 943, 100 S.Ct. 2169, 64 L.Ed.2d 798 (1980) (recusal not required where trial judge had prosecuted defendant for several unrelated crimes during the period four to thirteen years prior to the time of trial); Gravenmier v. United States, 469 F2d 66, 67 (9th Cir.1972) (where trial judge was of counsel in prior prosecution six years before present unrelated prosecution, recusal not required); Darlington v. Studebaker-Packard Corp., 261 F.2d 903, 906 (7th Cir.), cert. denied, 359 U.S. 992, 79 S.Ct. 1121, 3 L.Ed.2d 980 (1959) (recusal not warranted where trial judge had represented defendant in unrelated matters for a period of four to five years which ended three to four years before judge's decision); Royal Air Maroc v. Servair, Inc., 603 F.Supp. 836 (S.D.N.Y. 1985) (prior representation by trial judge of defendant's parent corporation in unrelated matter twelve years earlier no basis for recusal).

Id. at 659 (emphasis added). See also, Schurz Communications, Inc. v. Federal Communications Commission, 982 F.2d 1057 (7th Cir. 1992) (lapse of time is a factor militating against an appearance of partiality based upon judge's work as an expert witness while in private practice). In short, the work I did as a junior associate in a law firm more than 20

years ago in connection with firm's representation Mahler and/or Hudson Oil in connection with a state criminal prosecution "is too remote and too innocuous to warrant disqualification under § 455(a)...." Chitimacha Tribe of Louisianna, 690 F.2d at 1166.

Also militating against disqualification is the fact that Alcan did not seek disqualification in Alcan I even though it was made aware of the same facts on which it now relies to seek disqualification. In this regard, although timeliness in submitting a motion to recuse is not explicitly required under § 455(a), a number of courts have interpreted §455(a) to require it implicitly. Those courts have determined that once a party seeking recusal knows of the facts on which recusal is based, it must move promptly to disqualify under § 455(a) or lose the right to do so. See United States v. Anderson, 160 F.3d 231, 234 (5th Cir. 1998) ("Section 455 also obligates a party to raise the disqualification argument at a reasonable time in the litigation.... [W]hen a party seeking recusal knows or should know the facts on which recusal is based he must make a timely motion to disqualify or lose the right to do so."); Hollywood Fantasy Corp. v. Gabor, 151 F.3d 203, 216 (5th Cir. 1998) (same); Summers v. Singletary, 119 F.3d 917, 920 (11th Cir. 1997) (finding a § 455(a) motion untimely where counsel was aware of pertinent facts prior to hearing but failed to move), cert. denied, 523 U.S. 1005 (1998); United States v. Barrett, 111 F.3d 947, 951 (D.C. Cir.) ("Thus, while section 455(a) contains no express timeliness provision, most circuits considering the matter have concluded that a litigant must raise the disqualification issue within a reasonable time after the grounds for it are known."), cert. denied, 522 U.S. 867 (1997); United States v Kimball, 73 F.3d 269, 273(10th Cir. 1995) (same); United States v.

Brinkworth, 68 F.3d .633 639 (2nd Cir. 1995) ("Although §455 does not specify a time limit for application, a timeliness provision has been judicially implied."); Travelers Ins. Co. v. Liljeberg Enters., Inc., 38 F.3d 1404, 1410 (5th Cir. 1994) ("Furthermore, it is well-settled that — for obvious reason — one seeking disqualification must do so at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification."); United States v. Slay, 714 F.2d 1093, 1094 (11th Cir. 1983) ("A motion to disqualify... under § 455(a) must be timely."), cert. denied, 464 U.S. 1050(1984). This judicially-imposed timeliness requirement under § 455(a) arises from the concern that a party will use § 455(a) as a tactical weapon only to be used if needed. See United States v. Vadner, 160 F.3d 263, 264 (5th Cir. 1998) ("The most egregious delay — the. closest thing to per se untimeliness — occurs when a party already knows the facts purportedly showing an appearance of impropriety but waits until after an adverse decision has been made by the judge before raising the issue of recusal."); Rabuska v. Crane Co., 122 F.3d 559, 566 (8th Cir. 1997) (finding that where party waited until after summary judgment was entered against it, a recusal motion under § 455(a) was untimely), cert. denied, 523 U.S. 1040 (1998); United States v. Rogers, 119 F.3d 1377, 1380 (9th Cir. 1997) ("As we have often stated, a party having information that raises a possible ground for disqualification cannot wait until after an unfavorable judgment before bringing the information to the courts attention."); In re Kansas Public Employees Retirement Sys., 85 F.3d 1353, 1360(8th Cir. 1996) ("We subscribe to the view that motions to recuse should not 'be viewed, as an additional arrow in the quiver of advocates in the face of [anticipated] adverse rulings.'" (quoting. TV Communications Network, Inc. v. ESPN, Inc., 767 F.

Supp. 1077, 1081 (D. Colo. 1991)); Brinkworth, 68 F.3d at 639 ("We have noted that 'prompt application avoids the risk that a party is holding back a recusal application as a fall-back position in the event of adverse rulings on pending matters.'" (quoting In re IBM, 618 F.2d 923, 932 (2d Cir. 1980)); United States v. York, 888 F.2d 1050, 1055(5th Cir. 1989) ("A timeliness requirement forces the parties to raise the disqualification issue at a reasonable time in the litigation. It prohibits knowing concealment of an ethical issue for strategic purposes... . [A] timeliness requirement will proscribe motions that would have invalidated a fully completed trial."); United States v. Branco, 798 F.2d 1302, 1304 (9th Cir. 1986) ("A defendant cannot take his chances with a judge and then, if he thinks that the sentence is too severe, secure a disqualification and a hearing before another judge."); In re Garofalo's Finer Foods, Inc., 186 B.R. 414, 440 (Bankr. N.D. Ill. 1995) ("The purpose of the court imposed timeliness requirement is to foreclose a litigant from purposely waiting 'to learn whether the judge has ruled in its favor on the merits of the case before seeking disqualification as a means to defeat an unfavorable ruling.").

The Second Circuit has set forth a four factor test for determining whether a §455(a) motion is untimely: (1) the movant has participated in a substantial manner in trial or pretrial proceedings; (2) granting the motion would represent a waste of judicial resources; (3) the motion was made after the entry of judgment; and (4) the movant cannot demonstrate good cause for delay in filing the motion. Brinkworth, 68 F.3d at 639. In this case, Alcan is moving for disqualification on the basis of facts disclosed about five years ago in Alcan I. Alcan does not contend that it learned of additional facts since

Alcan I that suggested an appearance of partiality on my part. The fact that Alcan did not move for disqualification in the first case indicates that it perceived no appearance of partiality based upon the same facts on which it now rests its recusal motion.. In this regard; the limited investigation recently conducted by Alcan disclosed no material facts at variance with the disclosure I made in this case and in Alcan I. The fact that Alcan has now moved for disqualification, after the judgment in Alcan I became final, raises suspicions as to its motivation. Finally, Alcan has failed to 'demonstrate good cause for its delay in moving under § 455(a).

"The judicial process can hardly tolerate the practice of a litigant with knowledge of circumstances suggesting possible bias or prejudice holding back, while calling upon the court for hopefully favorable rulings, and then seeking recusal when they are not forthcoming." Smith v. Danyo, 585 F.2d 83, 86 (3d Cir. I978). "After a massive proceeding..., when the court has invested substantial juridical resources and there is indisputably no evidence of prejudice, a motion for recusal of a trial judge should be supported by substantial justification, not fanciful illusion." Martin v. Monumental Life Ins. Co., No. 00-3307, 2001 WL 52547, *11 (3d Cir. Jan.'23, 2001). In this case, Alcan's motion is not supported by substantial justification. Thus, disqualification under § 455(a) is not warranted.

B. Disqualification Under § 455(b)(2)

Section 455(b)(2) provides that a judge is disqualified:

> where in private practice he served as a

> lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it.. . . [Emphasis added.]

Without citing any authority, Alcan asserts that "[t]here is no dispute that the Court served as a lawyer in the matter in controversy and that his client or clients would have had interests adverse to Alcan's, and would have benefitted from the imposition of liability on Alcan." (Motion for Recusal at 4-5.) As an initial matter, the fact that a former client of a judge is a party to a case over which that judge is presiding does not warrant disqualification, even if the former client's interests are adverse to the party requesting disqualification. See National Auto Brokers Corp. v. General Motors Corp., 572 F.2d 953, 958 (2d Cir. 1978), cert. denied, 439 U.S. 1072 (1979). The question of disqualification turns not on the mere presence of a former client of a firm with which the judge had been associated, but on whether the judge served as a lawyer "in the matter in controversy" in the litigation over which the judge is presiding.

As noted above, Alcan offers no support for its capacious reading of the phrase "matter in controversy," and no support for Alcan's view can be found. Clearly, the phrase does not embrace any related case. See Schurz Communications, 982 F.2d at 1061. Otherwise, a judge who had an active private practice before coming to the Bench would find him or herself constantly disqualified in a wide variety of cases. Indeed, the Eighth Circuit has rejected the contention that "the 'matter in controversy'

contemplated by the recusal statute may extend beyond the litigation conducted under the same docket number where the issues in dispute are sufficiently related." Little Rock School District v. Pulaski County Special School District No. 1, 839 F.2d 1296, 1302 (8th Cir.), cert. denied, 488 U.S. 869 (1988). See also, Patterson v. Masem, 774 F.2d 251, 254 n.2 (8th Cir. 1985). Another court has suggested a somewhat broader reading of the phrase, explaining:

> [A] former representation should trigger the 'matter in controversy' requirement if the issues with which [the judge] dealt are put 'in issue' in the subsequent case in the sense that they need to be resolved by the judge who is presiding over the subsequent case. If the judge need not resolve an issue that either she or her former partners were involved in, then there is no appearance of impartiality and the purpose of Section 455(b)(2) is satisfied.

United States v. Cleveland, No. Crim. A. 96-207, 1997 WL 222533, at * 11 (E.D. La. May 5, 1997).

Under this interpretation of § 455(b)(2), disqualification is not warranted. The matter involved in the former representation did not concern CERCLA liability; it concerned state law criminal responsibility. Alcan has not shown how the issues to be litigated in this cost recovery case are at all related to the issues adjudicated nearly 20 years ago for alleged criminal violations of state law. The fact that both cases involved the same Site does not mean they involved the same "matter in controversy." Whether Mahler and/or Hudson Oil Company is responsible for all or

some of the response costs that the government seeks to recover from Alcan is wholly separate from whether Mahler and/or Hudson Oil violated Pennsylvania criminal law. Because I did not serve as a lawyer in the matter in controversy here, and no lawyer with whom I previously practiced law served during such association as a lawyer concerning the matter in controversy here, disqualification under § 455(b)(2) is not required.

III. CONCLUSION

For the foregoing reasons, Alcan's motion for disqualification will be denied. An appropriate Order is attached.

/s/ Thomas I. Vanaskie,
Chief Judge
Middle District of Pennsylvania

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

(Filed Feb. 07, 2001, Deputy Clerk)

UNITED STATES OF AMERICA
Plaintiff

NO 3 CV 99-1160

V.

Chief Judge
Vanaskie

ALCAN ALUMINUM
CORPORATION
Defendant.

ORDER

NOW, THIS 7th DAY OF FEBRUARY, 2001, for the reasons set forth in the foregoing Memorandum, IT IS HEREBY ORDERED THAT defendants' motion for recusal (Dkt. Entry 21) is DENIED

/s/ Thomas I. Vanaskie,
Chief Judge
Middle District of Pennsylvania

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

March 9, 2001
*March 22, 2001
C-73

No. 01-1590

IN RE: ALCAN ALUMINUM CORPORTATION

(D.C. Civil No. 99-1160 Middle District (Scranton)
(TIV)

Present: MANSMANN, RENDELL and STAPLETON, Circuit Judges

1. Petition for Writ of Mandamus.
*2. Clarification To Brief In Support of Petition For Writ of Mandamus which the Court may construe as a Supplement to Petition for Writ of Mandamus.

/S/ Tika L. Parks (267) 299-4929
Case Manager

ORDER

The foregoing

Petition for Writ of Mandamus is denied. Judge Stapleton would have required an answer before resolving the issue raised by the petition.

By the Court
/S/ Circuit Judge

Dated: APR 03 2001

/CC: JJB, RL, LAS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 01-1590

IN RE: ALCAN ALUMINUM CORPORATION,
Petitioner

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civil No. 99-cv-01160)
District Judge: Honorable Thomas I. Vanaskie

Present: BECKER, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, and STAPLETON,* Circuit Judges

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SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR
REHEARING IN BANC

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*Hon. Walter K. Stapleton, Senior Judge of the United States Court of Appeals for the Third Circuit; vote limited to panel hearing only.

The petition for rehearing filed by appellant having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

/S/ Circuit Judge

Dated: June 22 2001
GF/CC: Hon. Thomas I. Vanaskie
LAS
GSG
TSA

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ALCAÑ ALUMINUM CORPORATION, Civil Action
Plaintiff, No. 98-11062-JLT

VS

BUTLER AVIATION-BOSTON, INC. Judge Joseph L.
ET AL Tauro
Defendants. December 21, 1999

DEPOSITION OF KENNETH W. MANSFIELD, JR.

APPEARANCES:

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Also present: Sandra Hutchinson

DONALD E. HUBBARD, LSR #00007
REGISTERED PROFESSIONAL REPORTER

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A. That's correct.

Q. And you were under instructions to do that; is that correct?

A. That's correct.

Q. Do you have any idea as to when that was the case?

A. If they called in 15,000 gallons and there was only six there, then obviously somebody was going to be the wiser and nobody knew who was watching us.

Q. Now, do you know whether the government was paying Russell Mahler for the oil pickups, or you were paying the government for those pickups?

A. To my knowledge, the government was paying us for those pickups. Why else would I be sitting there wasting his money?

Q. So that – so, is it my understanding from your testimony you were sitting there because there was an expectation that if there was a purchase order for a particular amount of oil and there was, in fact, less oil delivered or pumped from it, the government would nonetheless pay on the volume of the purchase order, the volume that was stated on the purchase order; is that correct?

A. That's correct.

Q. And you were under instructions from your superiors to stay there and have it appear that you were pumping the oil, as I understand your testimony, because that would make no one else the wiser that, in fact, the volume you were pumping was not, in fact, an accurate number; is that correct?

A. That's correct.

Q. Now, do you know who was issuing the purchase orders for the government?

A. No.

Q. Do you know who would know?

A. I would think Edith Gilman would know.

Q. Do you know if she is around?

A. I have no idea.

Q. Do you know her last address or location?

A. Regal Park, New York.

Q. What was it?

A. Regal Park, New York.

Q. Regal Park, New York. Now, did you ever take anything from the Brooklyn Navy Yard to any other -- where did you take them? Let me ask that. Where did you take the loads that you picked up at Brooklyn Navy Yard?

A. Those were taken, to the best I can remember, back to the plant in Long Island City.

Q. Were any loads taken to any other location

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA and THE STATE OF NEW YORK,

87-CV-920

-versus-

91-CV-1132

ALCAN ALUMINUM CORPORATION,

-versus-

CORNELL UNIVERSITY.

TRANSCRIPT OF PROCEEDINGS held in and for the United States District Court, Northern District of New York, at the Federal Building and Courthouse, 15 Henry Street, Binghamton, New York, on TUESDAY, October 5, 1999, before the HON. THOMAS J. MCAVOY, Chief United States District Court Judge, PRESIDING.

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A. Yes.

Q. And you said to the best of your knowledge about two million gallons of the Alcan oil emulsion was land spread at the Sealand site?

A. Yes

Q. And you also said that Dames & Moore did an intensive PCB investigation on the land spread area?

A. I'm sorry. Dames & Moore did what?

Q. Did an intensive PCB investigation on the land spread area?

A. They did. Investigated the land spreading area as part of their investigation of the whole site.

Q. Okay. All of the samples that you were asked about as to PCBs, there was one sample, one test analysis that actually was above the detection limit for PCBs, is that correct?

A. Well, there was one sample that was not qualified. There were other – other detections above the detection limit, but those data points were qualified.

Q. They were all qualified. I'm referring to page 7-2 of the Dames & Moore report, and it indicates that the levels observed at the SRI are less than one order of magnitude lower than the 10 ppm

PCB level suspected to be due to past farming and other activities at the site. Are you familiar with that statement in the report?

A. I don't remember the statement.

Q. Were other materials from different companies disposed of on the land spread area at Sealand to your knowledge?

A. Yes.

Q. You also indicated that a portion of the Alcan oil emulsion may have went to the 20,000-gallon storage tank, is that true?

A. Yes.

Q. Now, Alcan's material wasn't the only material that was stored in that tank, correct?

A. I don't know that.

Q. Do you know whether material from other entities was disposed of in the cell area?

A. Yes.

Q. Referring again to page 7-2 of the Dames & Moore report there's a statement that says, no public health threat is readily apparent with respect to the wastes disposed in the land spreading area.

Are you familiar with that statement?

A. Yes, I am.

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Q. And do you agree with that statement?

A. Yes, I do.

Q. Mr. Gallagher had asked you about the table 4.2 and had you explain the J moniker and what it meant. All.....

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA and THE STATE OF NEW YORK,

87-CV-920

-versus-

91-CV-1132

ALCAN ALUMINUM CORPORATION,

-versus-

CORNELL UNIVERSITY.

TRANSCRIPT OF PROCEEDINGS held in and for the United States District Court, Northern District of New York, at the Federal Building and Courthouse, 15 Henry Street, Binghamton, New York, on TUESDAY, October 7, 1999, before the HON. THOMAS J. MCAVOY, Chief United States District Court Judge, PRESIDING.

UNITED STATES DISTRICT COURT
VICKY ANN THELEMAN, RPR, CRR

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Q. don't have answers to. This isn't a controlled environment setup. The fact that we found PCBs at the site is what is important, because somehow – and again, we can't sample every little part of a million-gallon lagoon, you know, the samples that were taken did not show PCBs. That did not mean the PCBs were absent.

R. Okay. I'd like to go back and just, if I could, to the previous question concerning the nickel. My colleagues just brought up the Kate Donnelly report, which is in evidence. Can you take a look at page – I can't read these. These are not very clear, but isn't it clear that, in fact, you did look for nickel?

A. Apparently.

A. Thank you very much. Now, I'd like to move on to the second part of your opinion. The moving mixtures part. Isn't it really the fundamental basis of your opinion that the reason this happens as things are commingled?

A. Isn't it true what happens?

Q. That the reason, for example, that the rain moves the contaminants is because the rain becomes commingled with the contaminants?

A. Well, it certainly is true that when it rains the rain fills the lagoon. The lagoon overtops.

Whatever oil overflows from the top of the lagoon will now be mixed with rainwater, which will increase the surficial flow to other locations. And, yes, rainwater will also percolate through the soil and carry hazardous substances with it into the subsurface, including into the underlying ground water aquifer.

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Q. Do you recall in your deposition when I asked you, when you were describing the impact of the Alcan emulsion, particularly with respect to the water phase, if you were describing a phenomenon just like rain and you answered yes?

A. Would you read the question and answer that you gave?

Q. I'd be delighted to, yes.

MR. BAER: Your Honor, I'd ask the witness be allowed to see his answer.

THE COURT: He can read it to him. As long as the witness knows what he's alleged to have said, he can confirm or deny if he said it.

MR. SALIBRA: It's on page 50.

"QUESTION: Okay. I'd like to go back, if I can, and consider each one of these. The first indication of increased migratory potential was because I think you described as a fact that the water in the emulsion could cause things to become water soluble, is that correct?"

A. Yes.

Q. Your answer was yes.

"QUESTION: And that you indicated would cause certain materials at the site that were water soluble to become more easily migratory underground?

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"ANSWER: Yes."

A. Yes.

Q. "QUESTION: How does that differ from water coming from rain, for example?

"ANSWER: It doesn't."

A. And I agree with that. It doesn't make any difference what the source of the water is, whether it's rainwater, tap water, ocean water. Water is water. And water will perform the same way on each and every occasion in which it distributes hazardous substances.

Q. And do you recall we discussed the similar phenomena with respect to the oil phase?

A. Yes.

Q. And I asked you if it was similar to, for example, the buttermilk content of milk?

A. Yes.

Q. And you said it's the same?

A. I indicated that the butterfat in milk will cause the dispersion of hazardous substances just like oil, wastes would cause the dispersion.

Q. And then I asked you: Is it possible for you to come – divide the harm from these migratory phenomena and you said, no, once it's commingled, you really can't. Isn't that true?

A. By the "it" you mean milk and emulsion; Alcan emulsion?

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Q. Yes.

A. That's true.

Q. And so you said – basically what you said is once these are commingled, be they water and milk and the hazardous substances or the emulsion and the hazardous substances, that migratory impact is fundamentally indivisible because they're commingled?

A. That's right.

MR. SALIBRA: Thank you very much.

THE COURT: Redirect?

MR. BAER: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. BAER:

Q. Dr. Meyer, is there a difference between an emulsion on one side and water and oil not in the form of an emulsion on the other?

A. Not in the form of an emulsion.

Q. In other words, if I were to give you water and give you an oil and put it in a container and put in another container an emulsion of water and oil, is the fact that one is an emulsion and the other is merely water and oil in any way different?